

The Enforcement of Marine Pollution Regulations

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I. INTRODUCTION

The achievement of effective control over marine pollution depends upon agreement both on adequate anti-pollution regulations in matters such as hull design, manning requirements and permissible discharge rates, as well as agreement on an effective enforcement procedure. A major area of disagreement concerns the body which should be responsible for prescribing the appropriate standards—the alternatives being basically either individually, by coastal States, or an international agency.

Agreement on the body to be given competence to prescribe such rules is, in practice, the more difficult problem on which depends, to a large extent, agreement on the bodies to be given competence to enforce the rules.¹ However, the concept of “enforcement” jurisdiction has recently undergone considerable refinement and, while

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1. This split into prescriptive or legislative jurisdiction and enforcement jurisdiction is traditional in international law. See the Case of the S.S. “*Lotus*,” [1927] P.C.I.J., Ser. A, No. 9. Cf. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1 (1964), reprinted in MANN, *STUDIES IN INTERNATIONAL LAW* 112 (1973).

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it would be wrong to suggest that these recent changes hold the key to agreement on the regulation of marine pollution, it seems reasonable to claim that the additional flexibility which they introduce should facilitate accommodation of conflicting national interests and the establishment of an effective regime for the control of marine pollution. This article will review the present position under customary international law and under the conventions dealing with pollution, and then examine the three main trends which appeared during the 1974 United Nations Conference on the Law of the Sea.

II. THE POSITION UNDER CUSTOMARY INTERNATIONAL LAW

Initially, it can be simply stated that the flag State has legislative jurisdiction over its vessels wherever they might be, and also has enforcement jurisdiction over its vessels except when they are in internal waters and territorial seas of third States.

Coastal States clearly have both legislative and enforcement jurisdiction over vessels in their internal waters and territorial seas.² The exercise of this jurisdiction over foreign ships in the territorial sea is limited by art. 19 of the 1958 Territorial Sea Convention, but coastal States are entitled to arrest any person or conduct any investigation in relation to a pollution offense committed within the territorial sea, subject to obligations to advise the consular authorities of the flag State if the captain of the ship so requests and to pay due regard to the interests of navigation. Where a ship outside the territorial sea causes pollution within the territorial sea it will be subject to the legislative jurisdiction of the coastal State, though not to its enforcement jurisdiction,³ for example, in the same way as a man in State X shooting and wounding another across the border in State Y would be liable to prosecution in State Y, although he could not be arrested by the authorities of State Y until he came within their national boundaries. Jurisdiction over ships in ports and internal waters which have committed pollution offenses within the territorial sea is more easily exercised and is not subject to limitations under the Convention or principles of in-

2. Cf. art. 1, 1958 Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205 [hereinafter cited as 1958 Territorial Sea Convention].

3. Cf. the Case of the S.S. "Lotus," [1927] P.C.I.J., Ser. A, No. 9.

ternational comity.⁴

If the coastal State fails to apprehend the vessel within the territorial sea it may exercise its right of "hot pursuit" into the high seas.⁵ If the ship nonetheless escapes the enforcement jurisdiction of the coastal State, or if the act resulting in the pollution of the territorial sea took place outside that area and the ship was never subject to the State's enforcement jurisdiction, then the State seems to have two ways of prosecuting the matter.⁶ First, it may request the flag State to institute proceedings when the ship returns to its ports; should the flag State accede to the request it would apply its own law to the alleged infringement. Unfortunately, some flag States are unable or reluctant to exercise effective control over their vessels, even when documented evidence of violations of regulations is provided by the requesting State. Secondly, the coastal State may solicit the aid of a third State within whose jurisdiction the offending vessel may later fall. The coastal State has no right to commence criminal⁷ proceedings in its own name in the courts of such third State, since this would involve the courts in assisting States in the performance of acts of sovereignty in foreign countries in derogation of the host State's territorial supremacy,⁸ and the third State would have no jurisdiction over the offense at all. It appears that States may agree to assume the prosecution of an offense which took place outside their jurisdiction with the consent of the State which has jurisdiction⁹ so long as this does not infringe the rights of other States. Thus, if State A asked State B to prosecute X, a national of State C, for an offense committed within the jurisdiction of State A, and State B agreed (X being within its enforcement jurisdiction), State C could validly object that the pro-

4. There is a rule of international comity according to which States normally refrain from exercising their jurisdiction over ships in their ports in respect of offenses which do not disturb the "good order" of the coastal State—the so-called "internal economy" rule. See the United Kingdom reply to the Hague "Questionnaire" of 1930, in A. MCNAIR, II INTERNATIONAL LAW OPINIONS 194 (1956).

5. 1958 Territorial Sea Convention, art. 24.

6. In civil actions proceedings may be instituted against a sister ship owned by the same company. An extension of this principle to criminal cases would be most valuable.

7. "Criminal" proceedings here include proceedings to recover penalties due to the State by way of compensation for pollution damage, these being analogous to proceedings under revenue laws, which are not enforced by foreign States. Cf. MANN, *supra* note 1, at 124; and A. DICEY & J. MORRIS, THE CONFLICT OF LAWS 79 (9th ed. 1973).

8. Cf. MANN, *supra* note 1, at 124.

9. Cf. the European Convention on the Punishment of Road Traffic Offences, EUR. T.S. No. 52 (1964), and the European Convention on the Transfer of Proceedings in Criminal Matters, 11 INT'L LEGAL MATERIALS 709 (1972), both of which provide for the assumption of proceedings.

ceedings were contrary to international law—being an unlawful extension of the jurisdiction of State A or State B,¹⁰ or being inconsistent with basic concepts of territorial sovereignty and jurisdiction. Similar problems exist regarding the enforcement by States of judgements passed in criminal matters, whether in the presence of the accused or not, by the courts of another State; that is, while municipal laws generally have not allowed for such enforcement,¹¹ there seems no reason why they should not do so subject to the consent of the States concerned.

It is fairly clear that a State may request another State to assist in investigating an alleged offense, and in other preparatory matters such as interrogation of witnesses, service of documents and so forth, although it is probably true that a State cannot undertake such activities within the jurisdiction of another without its consent.¹²

In contrast to the rules applicable to jurisdiction over pollution of the territorial sea, the question of jurisdiction over ships on the high seas and polluting those seas is quite simple: only the flag State has jurisdiction.¹³ Where any such pollution presents a grave threat to a neighboring coastal State, that State may decide to act against the ship, perhaps justifying its action by reference to principles of self-defense or necessity. However, as has been shown,¹⁴ the former is quite inappropriate, only being available against unlawful acts or omissions of another State, which is unlikely to be the case. The latter is only allowable when the stringent conditions of necessity have been fulfilled. Further, both are justifications for specific acts which are otherwise unlawful and cannot form the basis for the establishment of a permanent jurisdictional zone.¹⁵

10. Depending on whether the public law of State A or State B was applied, the 1972 European Convention provides that the State assuming the prosecution should apply its own law.

11. See the European Convention on the International Validity of Criminal Judgments, EUR. T.S. 10 (1970).

12. See the fascinating case of *U.S. v. Hay*, 13 INT'L LEGAL MATERIALS 630 (1974).

13. Cf. art. 6, 1958 Convention on the High Seas, 450 U.N.T.S. 82.

14. Brown, *The Lessons of the Torrey Canyon*, 21 CURRENT LEGAL PROBLEMS 113 (1968).

15. Mr. Trudeau, Press Release, April 15, 1970, and Background Notes of April 8, 1970, on the passing of the Canadian Arctic Waters Pollution Act, 1970. See 9 INT'L LEGAL MATERIALS 600 (1970).

The position in pollution zones set up apart from the territorial sea, perhaps as part of an economic zone, would depend upon the precise nature of the claim. Thus, a claim to legislative and enforcement jurisdiction,¹⁶ if upheld, would give the coastal State the same rights over pollution as it has in its territorial sea; a claim to legislative jurisdiction only would give the coastal State the same rights as it has over polluters who pollute its national waters but do not enter those waters; and a claim to enforcement jurisdiction¹⁷ only would allow the coastal State to exercise such control as was necessary to prevent or punish infringement within its territorial sea of its pollution regulations.

III. THE POSITION UNDER CONVENTIONS DEALING WITH POLLUTION

It has been seen that under customary international law, jurisdiction over ships is limited to coastal and flag States, although either may request the assistance of other States. This sharing of jurisdiction necessarily forms the basis of the enforcement provisions of conventions dealing with pollution of the seas. Thus, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil,¹⁸ which related, broadly speaking, to sea areas within 50 miles from the nearest land,¹⁹ provides that any discharge of oil prohibited by the Convention "shall be an offense punishable under the laws of the relevant territory in respect of the ship"²⁰—the relevant territory being the State in which a ship is registered, or whose nationality is possessed by an unregistered ship.²¹ Apart from the jurisdiction of the flag State utilized by the Convention, it is provided that "[n]othing in the present Convention shall be construed as derogating from the powers of any Contracting Government to take measures within its jurisdiction in respect of any matter to which the Convention relates or as extending the jurisdiction of any Contracting Government."²² Thus, the Conventional rules are to be enforced primarily by an exercise of flag State juris-

16. *E.g.*, the Canadian Arctic Waters Pollution Act, 1970.

17. *Cf.* The British view of the "contiguous zone" provisions of the Territorial Sea Convention in Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 INT'L & COMP. L.Q. 73 (1959); Oda, *The Concept of the Contiguous Zone*, 11 INT'L & COMP. L.Q. 131 (1962).

18. 327 U.N.T.S. 3; the Convention was amended in 1962, and is in force in this amended form; see U.K.T.S., No. 59 (1967).

19. 1954 Convention for the Prevention of Pollution of the Sea by Oil, 327 U.N.T.S. 26.

20. *Id.* art. VI (1).

21. *Id.* art. II (1).

22. *Id.* art. XI.

diction, but without prejudice to the jurisdiction of coastal States over their national waters. The Convention also formalizes the right of States to call upon the flag State to act against contraventions of the Convention rules by its ships, by requiring the Government of the "relevant territory" when furnished with particulars in writing of such contravention, to investigate the matter and, if sufficient evidence is available, to take proceedings against the owner or master of the ship as soon as possible and inform the party furnishing the information of the result of such proceedings.²³ This position is not changed by any of the proposed amendments²⁴ to the Convention. The 1954 Convention therefore leaves enforcement in the hands of the flag and coastal States and in no way extends either enforcement or legislative jurisdiction as it exists under customary international law. It does, however, modify the principle of international comity²⁵ according to which States normally refrain from exercising the local jurisdiction over vessels in their ports by allowing the port State to inspect the oil record book, which includes details of any discharges of oil, of vessels of any other party to the Convention.²⁶ Thus, under the 1954 Convention, the only occasion on which a State has the right to arrest and prosecute foreign ships for a contravention of the Conventional rules is when such a vessel, having polluted its territorial sea, is within its territorial sea.

The 1969 Brussels Convention on Intervention on the High Seas in Cases of Oil Pollution Casualties²⁷ allows parties to "take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests" from oil pollution following a maritime casualty.²⁸ Quite apart from the limitations imposed by the fact that the Convention relates only to maritime casualties, and that only States' "coastlines or related interests" may be protected, the Convention is couched in the language of self-defense and necessity, and seems to envisage only physical acts against the ship. There is no suggestion that

23. *Id.* art. X.

24. 1969 Amendments, IMCO Res. A.175 (VI) (1969); 1971 Amendments, IMCO Res. A.246 (VII) (1971).

25. See note 4, *supra*.

26. 1954 Convention for the Prevention of Pollution of the Sea by Oil, art. IX, 327 U.N.T.S. 10.

27. 9 INT'L LEGAL MATERIALS 25 (1970).

28. *Id.* art. I.

the Convention creates any jurisdiction over such casualties, but simply a statement of the manner in which a right to act against casualties beyond the State's jurisdiction must be exercised. Coastal States may well have jurisdiction over the vessel under customary international law; for instance, if the pollution reaches their territorial sea.²⁹ The Convention was extended to cover pollution or threat of pollution by substances other than oil in the 1973 protocol.³⁰

The 1969 Brussels Convention on Civil Liability for Oil Pollution Damage³¹ contains interesting provisions relating to jurisdiction which, although they only relate to civil proceedings, provide an interesting precedent for extensions of criminal jurisdiction. Enforcement is again left with flag and coastal States, which are required to ensure that vessels sailing under their flags, and all ships entering or leaving their ports, are carrying certificates attesting that the owner's liability for oil pollution damage is covered by insurance or other financial security.³² So far as proceedings under the Convention are concerned, it is provided that where pollution damage has been caused or measures have been taken to prevent or minimize such damage in the territorial sea of one or more of the parties, "actions for compensation may only be brought in the courts of any such Contracting State or States;"³³ thus preventing claims in the courts of the flag State. Final decisions of the courts of Contracting States are to be recognized and enforceable in each Contracting State³⁴—a necessary provision since, where actions are brought against the owner in more than one State he will constitute a compensation fund in any one of those States to be distributed among successful claimants in all such States.³⁵ There does not appear to be any reason why the courts of one State should not recognize such judgments of courts of another State, although the tendency is to pass municipal legislation to this effect.³⁶ An analogous scheme for criminal proceedings would be most useful and the recent proposals for port State jurisdiction represent something along these lines.

29. See text accompanying note 3, *supra*.

30. 13 INT'L LEGAL MATERIALS 605 (1974).

31. 9 INT'L LEGAL MATERIALS 45 (1970).

32. *Id.* art. VII (10), (11) at 54-55.

33. *Id.* art. IX at 56.

34. *Id.* art. X at 56-57.

35. *Id.* art. V at 48-51.

36. Cf. the U.K. Merchant Shipping (Oil Pollution) Act 1971, § 13(3), which extends the provisions of the 1933 Foreign Judgments (Reciprocal Enforcement) Act to cases arising under the Brussels Civil Liability Convention.

The 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter³⁷ requires permits to be issued by a State in respect of matter intended for dumping which is either loaded in its territory, or loaded by a vessel or aircraft registered in its territory or flying its flag when the loading occurs in the territory of a State not party to the Convention.³⁸ States are required to apply measures necessary to enforce the Convention in these cases, and also against vessels, aircraft and fixed or floating platforms under their jurisdiction which are believed to be engaged in dumping.³⁹ The Convention thus adheres to the traditional bases of jurisdiction but, in expressly recognizing the need to develop procedures "for the effective application of this Convention particularly on the high seas"⁴⁰ it acknowledges the shortcomings of these bases as the foundation of an effective regime for the control of marine pollution.

The most recent, and most ambitious, global convention on marine pollution is the 1973 London Convention on the Prevention of Pollution from Ships.⁴¹ This Convention, which regulates all forms of pollution from ships except dumping, and will thus supplant the 1954 Convention,⁴² is also based upon a combination of flag and coastal State enforcement. Thus, article 4 requires violations of the Convention to be prohibited under the law of the Administration of the ship concerned, and by the law of the State within whose jurisdiction the violation occurs. Coastal States are given the choice of proceeding with an action under their own law, or reporting the matter to the Administration of the ship. Where the Administration is informed of a violation of the convention, wherever that violation took place, it is obliged, if sufficient evidence is available, to take proceedings against the ship concerned and to promptly inform the party which furnished the information and IMCO. The Convention expressly provides that parties may inspect ships in their ports or offshore terminals,⁴³ and that they may also make such an inspection where a request to do so, accom-

37. 11 INT'L LEGAL MATERIALS 1291 (1972).

38. *Id.* art. VI.

39. *Id.* art. VIII.

40. *Id.* art. VII.

41. IMCO Doc. MP/CONF/WP.35.; 12 INT'L LEGAL MATERIALS 1319 (1973).

42. *Id.* art. 9 (1).

43. *Id.* art. 6 (2).

panied by sufficient evidence that the ship has discharged harmful substances in any place is received from any party.⁴⁴ (Evidence of an actual breach under the Convention is not required.) Violations discovered as a result of an inspection are to be reported to the requesting State, if any, and the Administration which is obliged to commence proceedings. Ships unduly delayed by the exercise of these enforcement measures are entitled to compensation for any loss or damage suffered.⁴⁵ The Convention, like the Dumping Convention, is stated to be without prejudice to the present or future views of any State concerning the law of the sea,⁴⁶ and has an interesting flexibility in the provision that "the term *jurisdiction* shall be construed in the light of international law in force at the time of application or interpretation of the present Convention."⁴⁷ This will allow the Conventional regime to accommodate itself to the development of concepts such as pollution zones and economic zones which may occur after the Convention comes into force.

The major pollution conventions are, as has been seen, based primarily on flag State enforcement, recognizing coastal State jurisdiction, and expressly stating the right of States to inspect vessels in their ports and offshore terminals. Similarly, the 1958 Geneva Conventions impose a general obligation on States to "draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the sea bed and its subsoil."⁴⁸ These measures will clearly be applied by the flag State only on the high seas,⁴⁹ by coastal States in relation to pollution arising from the development of the continental shelf,⁵⁰ and by both flag and coastal States in relation to pollution occurring within the jurisdiction of the latter.⁵¹

IV. DEFICIENCIES OF THE PRESENT BASES OF ENFORCEMENT

The present jurisdictional bases of schemes for the prevention of pollution are unlikely to support an effective legal regime. The

44. The Spanish delegation was probably correct in stating that "the rights granted to the port authority were not the only ones and did not affect its rights in territorial seas nor exclude the other rights of port States under international law."—that is, that art. 6 affirms part of the wider rights of inspection that States have. MP/CONF/SR.11, at 5.

45. 12 INT'L LEGAL MATERIALS 1319.

46. *Id.* art. 9 (2).

47. *Id.* art. 9 (3).

48. Art. 24, 1958 Convention of the High Seas, 450 U.N.T.S. 82.

49. *Id.* art. 6.

50. Art. 5, 1958 Convention on the Continental Shelf, 499 U.N.T.S. 311.

51. See introduction, *supra*.

jurisdiction of coastal States over adjacent waters is, of course, limited, and even if, as seems likely, some sort of economic zone beyond the territorial sea is allowed, this would extend for a maximum of 200 miles from the coast. Although such a 200 mile zone would cover all the semi-enclosed seas, for example the Mediterranean, the North Sea and the Gulf of California, which, being almost surrounded by land tend to trap pollution and are therefore especially vulnerable,⁵² it would leave the open oceans subject to the exclusive jurisdiction of flag States. It is also uncertain how successfully coastal States will be able to police any wider zones which they may claim—a problem made even more difficult by the obstacles to the enforcement of foreign penal judgements and the provision of lesser measures of judicial assistance.

Although it is certainly true that the high seas can absorb more pollution than other sea areas, it is still necessary that they should be protected from excesses of pollution.⁵³ The usefulness of flag State jurisdiction for this purpose is seriously prejudiced by the continuing growth of "flag of convenience fleets." One of the characteristics of a State offering flags of convenience is that it "has neither the power nor the administrative machinery effectively to impose any government or international regulations; nor has the country the wish or power to control the (shipping) companies themselves."⁵⁴ It is important to distinguish States offering flags of convenience from tax havens—the latter enforcing shipping regulations on safety, pollution and so forth, but giving favourable tax treatment to companies operating from their territory. Liberia and Panama are the leading flag of convenience States, together having over one sixth of the world tonnage in 1971. Bermuda and the Bahamas are among the leading tax havens, these territories, together with Gibraltar, having a total of approximately one half of one percent of the world tonnage in the same year. Tax havens are, however, growing rapidly in importance.⁵⁵

52. Alexander, *Regionalism and the Law of the Sea*, 2 OCEAN DEV. & INT'L L.J. 151 (1974).

53. Cf. Lanctot, *Marine Pollution: A Critique of Present and Proposed International Agreements and Institutions*, 24 HAST. L.J. 67 (1972).

54. COMMITTEE OF INQUIRY INTO SHIPPING [THE ROCHDALE REPORT] 1970, adopted by the OECD study on Flags of Convenience in *Maritime Transport* 1971, reprinted in 4 J. MAR. L. & COMM. 231 (1972).

55. OECD study, *supra* note 54.

Over 20% of the world's tonnage sails under flags of convenience, and there has been much criticism of their poor safety record. The 1973 shipping casualty statistics showed that Cyprus, a relatively small "convenience" State, lost more ships in that year than any other State, and 7 of the 21 ships lost in January 1974 were registered in Cyprus.⁵⁶ Although it would be wrong to suggest that all ship owners who register their ships under convenience flags do so in order to avoid the more stringent safety and manning requirements imposed by other States—since shipowners have every interest in securing the safety of their vessels—it would, perhaps, be fair to say that the authorities of such States do not exercise a sufficient degree of control over their ships to form an effective basis for the control of marine pollution. This is not to say that convenience States do not enact appropriate legislation, but that such legislation is not effectively enforced. It is impossible for any State to supervise all its vessels at all times during their voyages, but pollution offenses may be detected at sea by vessels or aircraft of other States and reported to the flag State, which can arrest the offending ship when it comes back to its home port. However, not only are convenience States sometimes unwilling to commence proceedings, but the ship may not appear within the waters of the convenience State with which, by definition, it has no real link, for many months.

V. PROPOSALS FOR MORE EFFECTIVE ENFORCEMENT

The Third United Nations Conference on the Law of the Sea saw a number of different approaches to the problem of effectively controlling marine pollution. Three proposals have been selected to represent the major types of jurisdictional provisions suggested; these proposals are based on refinements of flag or coastal State jurisdiction and on the creation of port State jurisdiction.

Strengthening Flag State Jurisdiction

First, the draft articles put forward by a number of European countries⁵⁷ seek to improve the present position by strengthening the flag State's control over its vessels. Article 6 provides:

56. See the statement by the International Confederation of Free Trade Unions (I.C.F.T.U.) to the Maritime Safety Committee of IMCO, March 29, 1974 [hereinafter I.C.F.T.U. Statement]; see also the letter from Mr. C.H. Blyth, General Secretary, International Transport Workers Federation, in SEATRADE, Winter 1973.

57. Belgium, Denmark, France, Germany (Federal Republic), Ireland, Italy, Luxemburg, Netherlands, U.K., working paper on the high seas. U.N. Doc. A/CONF.62/C.2/L.54 (1974).

1. Every State is obliged effectively to exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular the flag State shall . . . take the following action in respect of ships flying its flag:

[there follow specific duties to register and inspect ships, ensure that they are adequately manned and equipped, and]

(e) cause an inquiry to be held by or before a suitably qualified person . . . into every maritime casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals . . . or shipping . . . of another State or to the marine environment;

(f) assume jurisdiction under its municipal law over each such ship and over the masters, officer and crew in respect of administrative, technical and social matters concerning the ship and

(g) take the necessary measures to ensure that the master and officers are fully conversant with and obliged to observe the appropriate applicable international regulations concerning the safety of life at sea, the prevention and control of marine pollution and the maintenance of communication by radio.

The proposal may serve some purpose in specifying the obligations of the flag State, which are intended to supplement those of coastal States acting in the areas under their jurisdiction. For example, articulation of the obligation to hold inquiries into maritime casualties would seem to be valuable, since "Panama, Lebanon, Somalia and Cyprus have yet to hold an official public investigation into even one maritime loss despite the fact that the incidence of casualties and losses under those flags are the highest in the world."⁵⁸ The proposals are not, however, likely to be effective. There is no reason why States which have not exercised effective control over their ships in the past should do so under this proposed scheme. The Geneva Convention on the High Seas stipulates that "[t]here must exist a genuine link between the State and the ship; in particular the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."⁵⁹ Yet, this obligation has not been fulfilled. Proposals by the International Law Commission to introduce a sanction of non-recognition (that is, a provision that in the absence of such a genuine link effective control States would not be obliged to recognize the national character from which flows the inviolability of

58. I.C.F.T.U. STATEMENT.

59. Art. 6, 1958 Convention on the High Seas, 450 U.N.T.S. 88.

ships on the high seas) were rejected by the Geneva Conference.⁶⁰ The present draft makes no provision for a sanction against breach of the obligations of the flag State, merely stating in article 4 that:

A State which has reasonable grounds to suspect that proper jurisdiction and control has not been exercised in accordance with this Convention may report the facts to the flag State and request it to investigate the matter further. Upon receiving such a request, the flag State shall investigate the matter, take any action necessary to remedy the situation and notify the requesting State of the action taken.

Recognizing the inadequacy of this procedure, draft articles submitted by the Federal Republic of Germany⁶¹ require States to issue certificates of compliance with "regulations established in accordance with [the Convention to be established by the Conference]"⁶² and impose liability on the State for damage resulting from a failure to control the issue of such certificates:

Art. 1(3). If a State has issued a certificate for a ship flying its flag which does not comply with the requirements of the regulations and the ship causes pollution of the marine environment, the issuing State shall be internationally responsible for damage to other States and their nationals resulting from the pollution incident and shall pay compensation accordingly, unless the pollution incident was not due to the failure to comply with the requirements.

Such a provision would be of limited efficacy, especially since many pollution incidents are due, not to failure to comply with construction and manning regulations, but to deliberate disregard for discharge regulations or to simple negligence. Although a State could not certify that a ship would observe regulations in the future, it is obliged under article 1(1) of the German draft to "deny the right to fly [its] flag to ships which do not comply with such regulations." This could only be effective if States were to effectively exercise their jurisdiction and control over their ships, which is the very object which the draft seeks to attain. Even if liability did fall upon the flag State under article 1(3), this only arises in cases of damage to "States and their nationals", in which case the victims of pollution would be able to proceed against the pollutor himself.

Is anything to be gained from removing such actions from the jurisdiction of municipal courts to an international plane where problems of acquiring evidence, securing attendances and enforcing judgements are so much greater, and the chances of successful ac-

60. See the excellent discussion by MEYERS, *THE NATIONALITY OF SHIPS*, ch. V (1967).

61. A/CONF.62/C.3/L.7 (1974).

62. *Id.* art. 1 (1).

tion so much less? The problems of assessing damage are bound to be complicated, and likely to result in liability for only the most direct losses, so excluding liability for the general deterioration of the oceans under the cumulative effects of pollution which is a most important matter for effective control. Provision for inspection of ships in the ports, offshore terminals or internal waters of a State where there are clear grounds for suspecting that the condition of the ship does not substantially correspond with the requirements for the grant of the certificate, or reasonable grounds for believing that the ship has violated discharge regulations,⁶³ are likewise of little value, since the inspecting State is not given the right to proceed against the ship unless it has violated discharge regulations within that State's territorial sea. In other cases, the State can only report the matter to the flag State which is then obliged to take appropriate action against the ship.⁶⁴ The German draft article III provides what may be a more effective sanction:

Art. III(1). If a ship does not carry a valid certificate . . . States may deny such ship entry to their ports or offshore terminals, or passage through their territorial sea.

This would give all States through which a ship passed the opportunity of imposing some sanction for non-compliance with the conditions upon which the valid grant of a certificate depends, and would give an important right to exclude potential polluters from national waters and a valuable incentive to ship owners to comply with the Convention regulations. It would not, however, assist the prosecution of any polluters who were allowed into the territorial sea, or of vessels polluting the high seas.

Extending Coastal State Jurisdiction

A second approach to increased control over vessels involves an expansion of coastal State jurisdiction, and has come to be known as the "zonal approach".⁶⁵ The proposal is that States be given jurisdiction beyond their territorial seas, either in a specific pollution zone or in an economic zone within which States have control over most, if not all, activities connected with the "economic" uses

63. Art. II, A/CONF.62/C.3/L.7 (1974).

64. *Id.* art. II (3), art. III (2), art. IV.

65. See Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974), for a useful summary of this approach and of other matters under discussion at Caracas.

of the area. This supplements the exclusive jurisdiction of the flag State outside these areas of national jurisdiction. Although some proposals place the sea and seabed beyond national jurisdiction under the control of an international authority, which would exercise this control either to the exclusion of or concurrently with that of flag States, agreement on such an international authority in the foreseeable future seems to be unlikely. The zonal approach was used in draft articles sponsored by ten States at Caracas.⁶⁶ These envisaged control of pollution by both coastal and flag States:

Art. III

(1) States shall take all necessary measures to prevent pollution of the marine environment from any source

(2) States shall take all necessary measures to ensure that activities under their jurisdiction or control do not cause damage to areas beyond their national jurisdiction, including damage to other States and their environment, by pollution of the marine environment.

The draft goes on to provide for the establishment of a zone within which States have jurisdiction to adopt and enforce legislation against "all persons, natural and juridical, vessels, installations and other entities"⁶⁷ for the purpose of "protecting and preserving the marine environment and preventing and controlling pollution."⁶⁸ Such a regime has the same shortcomings as any other, including the present regime, based upon a sharing of jurisdiction between flag and coastal States, that is, a lack of effective control over ships flying convenience flags and certain obstacles to cooperation between States in prosecuting ships which pollute national waters. These problems are exacerbated by the increased width of the zone which the coastal State has to police,⁶⁹ and the increased importance of agreement on the body competent to prescribe rules applicable within the zone. The present draft gives the coastal State competence to prescribe "reasonable and non-discriminatory laws and regulations" for the zone "where internationally agreed rules and standards are not in existence or are inadequate to meet special circumstances"⁷⁰ but this solves nothing. Who is to decide whether the rules are reasonable, whether internationally agreed rules are adequate, and whether special circumstances exist? The grant of competence to coastal States in such vague terms is unlikely to be

66. Canada, Fiji, Ghana, Guyana, Iceland, India, Iran, New Zealand, Philippines, and Spain; Draft Articles on the zonal approach to the preservation of the marine environment. A/CONF.62/C.3/L.6 (1974).

67. *Id.* art. VII.

68. *Id.* art. VI.

69. The coastal State is obliged to exercise such control within the waters which it claims: see the comments of Judge Fitzmaurice on the territorial sea in the Fisheries Jurisdiction Case, [1973] I.C.J. 27.

70. Art. VII(3) (b) (ii), A/CONF.62/C.3/L.6 (1974).

acceptable to the major maritime States, and even if it were, the proposed regime would not be a great improvement upon the present position.

Port State Jurisdiction

The third approach departs from the traditional bases of jurisdiction by allowing prosecutions of offenders by "Port States"—that is, by any party to the Convention in whose ports the offender is found. The proposal is found in the Greek draft articles on the enforcement of provisions for the protection of the marine environment⁷¹ submitted to the Caracas conference. This was not the first time that such a proposal was advanced. Extensive discussion of port State jurisdiction took place during the 1973 London Conference on Marine Pollution, although eventually the proposal was shelved, apparently because it was thought more appropriate to deal with it at Caracas.⁷² The concept also appeared in earlier proposals to the U.N. Seabed Committee, notably from the United States⁷³ and the Netherlands,⁷⁴ and the 1971 Maltese Draft Ocean Space Treaty⁷⁵ which seems to envisage a similar method of enforcement by providing that vessels traversing the international ocean space beyond the limits of national jurisdiction and flying the flag of a State which does not effectively exercise control over its vessels may be subject to proceedings before the proposed International Maritime Court. It is clear, in the treaty, that it would not be left to the delinquent flag State to arrest such ships for the offenses which took place beyond the limits of coastal States' jurisdiction.

The Greek draft may be taken as a most recent manifestation of a move away from complete reliance on coastal and flag State jurisdiction led, somewhat surprisingly, by the North American

71. A/CONF.62/C.2/L.4 (1974).

72. Unfortunately no records of the proceedings of the committees are available, but see the draft amendments to art. 4 from Canada, Netherlands and Japan, MP/CONF/C.1/W.P.20; Canada, MP/CONF/C.1/WP.25; Australia, Canada and New Zealand, MP/CONF/C.1/WP.34; and the draft resolution on enforcement in ports, from Australia, Canada, Indonesia, Ireland, Trinidad & Tobago and United States, MP/CONF/C.1/WP.58. See also the plenary discussion in MP/CONF/SR.10.

73. A/AC.138/SC.III/L.40 (1973).

74. A/AC.138/SC.III/L.48 (1973).

75. A/AC.138/53 (1971).

States.⁷⁶ The draft attempts to deal with marine pollution from all sources, and for this purpose distinguishes four categories of pollution. First, land-based pollution, which is to be regulated by the State in which the source of the pollution lies;⁷⁷ secondly, pollution arising from the exploration and exploitation of the seabed, which is to be regulated by the flag and coastal States concerned;⁷⁸ and thirdly, pollution caused by dumping is to be regulated, as in the 1972 Convention, by flag and coastal States.⁷⁹ These categories are regulated on the traditional bases of flag and coastal State jurisdiction, but the fourth category, pollution from ships caused otherwise than by dumping, receives novel treatment.

The regulation of pollution from ships is primarily the obligation of the flag State, which is to prosecute violations either on its own initiative or at the request of other States under article 4:

Art. 4—Primary Obligation

(1) Regulations adopted in accordance with the provisions of this Convention for the protection and preservation of the marine environment from pollution shall be primarily enforced by the flag State which has a right and obligation to this effect.

(2) At the documented request of any State the flag State has an obligation to institute proceedings against the owner or master of any ship registered within its territory or flying its flag for the alleged violation of such regulations and inform the requesting State of the action taken upon such request.

Such a request may follow an actual sighting of the violation, or result from an investigation of the ship by a State under article 5, which provides:

(2) The coastal State has within areas under its national jurisdiction the right to inspect a ship registered in the territory or flying the flag of another State where serious pollution has been caused by such ship in the above areas.

(3) The port State has the right to inspect any ship while in its ports or at its offshore terminals.

Although such rights of inspection exist under customary international law, it is an important innovation for them to be so fully spelled out.

The treatment of proceedings against polluters is at the heart of proposals for port State jurisdiction. Article 6(1) provides that:

76. Cf. the United States statement to the 1973 London Conference, MP/CONF/SR.2, and the Canadian comments on their working paper, A/AC.138/SC.III/L.26 in the Seabed Committee Report, 27 U.N. GAOR, Supp. 21, at 213, U.N. Doc. A/8721 (1972). See also the summary records of Committee 3 at Caracas, A/CONF.62/C.3/SR.1 (1974).

77. Art. 1, A/CONF.62/C.3/L.4 (1974).

78. *Id.* art. 2.

79. *Id.* art. 3.

Where a violation of regulations concerning discharge of pollutants at sea is committed by a ship within the internal waters or the territorial sea of a contracting State proceedings against such ship may be instituted by the flag State, the coastal State or, at their documented request by any port State.

Thus, in providing that a port State can proceed against a ship within its enforcement jurisdiction with respect to events which took place beyond its legislative jurisdiction under customary international law the article removes the obstacles to the assumption of proceedings by foreign States. A major advantage of the Greek draft is that it accommodates the interests of maritime States by reserving certain rights to the flag State. Thus, a violation beyond the territorial sea but within the economic zone of a coastal State must, under article 6(2), be prosecuted

. . . by the flag State on the documented request of the coastal State within the economic zone in [sic] which the violation occurred. If no action is taken within six months from the receipt of such request proceedings shall be instituted by the coastal State or, at its documented request, by any port State.

Further, under article 6(3), violations beyond the limits of national jurisdiction can only be proceeded against by the flag State on its own initiative or at the documented request of another party. In addition to violations of discharge regulations on the high seas, violations of regulations concerning ship design, construction, equipment, manning or any matter other than discharge, are also within the exclusive jurisdiction of the flag State. In case of violation of "non-discharge" regulations, the flag State is to act

. . . on its initiative or at the documented request of any contracting State within the area of national jurisdiction in [sic] which such violation resulted in pollution or serious danger of such pollution.⁸⁰

These jurisdictional provisions preserve the interests of both coastal and flag States without jeopardizing the effective enforcement of pollution regulations.

This reciprocal enforcement scheme is completed by article 8, which provides that any sentence passed against a pollutor in accordance with the draft articles

. . . shall be enforced by any port State at the request of the State the appropriate authorities of which issued such sentence.

The possibility of double jeopardy is avoided by article 7, which

80. *Id.* art. 6 (4).

prohibits all States from commencing proceedings against an offender once another State has done so. Useful as the innovations of articles 6 and 8 are in securing more effective regulation of pollution, they do not and cannot overcome the obstacle of the right of non-party States to object to the use of the provisions against their nationals.⁸¹ This does not mean, of course, that such an obstacle should be allowed to stand in the way of such an improvement in the present regime.

VI. CONCLUSION

It has been noted above that the present regime, based on flag and coastal State jurisdiction over polluters, is deficient in several respects. Flag States are sometimes unable to institute proceedings against their vessels which may not visit their home ports for many months, and some States appear unwilling to do so even when the opportunity arises. Additionally, flag States cannot detect violations of pollution regulations, which may occur at any point on a ship's voyage, without the cooperation of coastal States. Coastal States only have jurisdiction in a belt of water adjacent to their coasts, and any widening of this belt in the interests of pollution control brings with it increasingly difficult problems of effectively policing the belt as well as the great problem of international agreement on the body to be given competence to prescribe rules for the belt.

Against this background, port State jurisdiction has a number of advantages. Firstly, the need to detain ships in transit for arrest or inspection is minimized; such actions may take place at any port on the ship's scheduled voyage. In particular, the competence given to the port State provides a suitable alternative to the inspection of suspected polluters on the high seas—a difficult procedure which maritime States would be likely to oppose strongly.⁸² Secondly, the burden on coastal States of policing their adjacent waters, which burden in the case of developing States with wide economic zones may be severe, is reduced, since they are given the right to the assistance of port States. Thirdly, increasing the number of potential prosecutors should facilitate the control of pollution and circumvent the problems created by States which are unable or un-

81. See introduction, *supra*.

82. Although some fisheries conventions allow such inspection, and even arrest of offending vessels, cessation of the violation would, in most cases, remove the need for the fishing vessel to remain in the area; violations of pollution regulations are incidental to the "larger purpose" of maritime transport, and inspection on the high seas is therefore far less likely to be tolerated by maritime States.

willing to effectively exercise their jurisdiction over their ships. Fourthly, it may be that port State jurisdiction, in offering increased control over polluters, may lead to a reduced demand for extensive zones of enforcement jurisdiction off coastal States.

The cautious approach of the Greek draft is likely to be most acceptable, but more radical proposals might be considered. For example, the port State might be given the right to proceed against polluters on its own initiative for violations of discharge regulations wherever that violation occurred, or where the violation occurred on the high seas. Alternatively, it might be given such a right if no proceedings have been instituted by the State which has the primary right to act within six months from the date of the violation or documented report of the violation. While modifications of the scheme could lead to tighter controls over pollution, they may well be less acceptable than the "middle way" of the Greek draft.⁸³ It must be stated, however, that the value of port State jurisdiction, and its acceptability, would be greatly increased if agreement were reached on internationally prescribed regulations which such States would enforce. The advantages introduced by the acceptance of port State jurisdiction could be obtained in a piecemeal fashion apart from any general convention on the law of the sea, but they would provide a firm and effective basis for any such future convention and therefore deserve careful consideration.

83. See the discussion in *Port State Jurisdiction*, a paper presented to the 1974 New Delhi Conference of the International Law Association by the British branch of the Association.